IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.1668 of 2003

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SUDHIRKUMAR PREMSHANKER SHUKLA - Petitioner(s)
Versus
BHAICHAND NAINSUKHLAL ZAVERI & 1 - Respondent(s)

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Appearance :
MR CHINMAY GANDHI for MR MB GANDHI for Petitioner(s) 1,1.2.1
MR DHIRENDRA MEHTA for Respondent(s) : 1,
DELETED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 18/08/2006

ORAL JUDGMENT

1. This is a petition challenging the order dated 29th April, 2000 made by the Court of 2nd Joint Civil Judge (S.D.), Surat in application Exhs.48 and 53 of Regular Civil Suit No.1418 of 1983.

2. Originally the petitioner herein (original defendant no.3) had preferred Civil Revision Application bearing No.718 of 2000 against the impugned order but in light of the amendment in Code of Civil Procedure w.e.f. 01.07.2002 the Civil Revision Application was withdrawn and the present petition preferred. In the circumstances, though the petition is styled as being a petition under Articles 226 and 227 of the Constitution of India, in effect and for all intents and purposes, this is a petition under Article 227 of the Constitution of India only.

3. The undisputed facts are that respondent No.1 herein (original plaintiff) filed Civil Suit No.1418 of 1983 in the Court of Civil Judge (S.D.), Surat praying for injunction and declaration qua the suit properties as, according to the plaintiff, he was legal heir and legal representative of late Shri Nainsukhlal (deceased father of the plaintiff), who was legal descendant of late Shri Ratanchand and his wife Bai Kamla. According to the plaintiff, his deceased father Nainsukhlal and one deceased Champakbhai were real brothers being sons of late Shri Ratanchand and Bai Kamla. That both late Shri Ratanchand and Bai Kamla passed away intestate and

accordingly, by virtue of intestate succession late Shri Nainsukhlal became entitled to ½ share in the property held by late Shri Ratanchand and subsequently by Bai Kamla. For the present it is not necessary to refer to the other sharers in the property. Suffice it to state that the plaintiff is claiming share in the properties of his grandfather late Shri Ratanchand and grandmother Bai Kamla through the branch of late Shri Nainsukhlal.

4. By application Exh.48 the plaintiff sought to bring legal heirs of defendant No.2 on record as defendant No.2 had expired on 11th September, 1998. This amendment was not seriously contested by the defendants.

5. Vide application Exh.53, the plaintiff sought amendment of the plaint so as to bring various additional facts on record and seek further relief of partition. This application was contested by the defendant. The trial Court, after hearing the parties, has come to the conclusion that the amendment does not change the basic structure of the plaintiff's suit and the additional relief sought by the plaintiff is not totally different from one which was earlier sought. It is stated as under:

> "12. Now on going through the plaint, once again all along the case of the plaintiff is that he has got share in the suit property, so it cannot be contended that now plaintiffs wants new relief. Moreover, the arguments of the learned advocate for the defendant, that since the amendment is sought after elapse of 13 years, is also not helpful since the right was agitated by the plaintiff earlier and plaintiff wants that right in continuation of his case. It cannot be contended that simply because much time has elapsed, the amendment should be refused, so, I am of the view of the amendment do not change the very basic structure of the plaintiff's suit as rightly pointed out by the learned advocate for the plaintiff, that relief sought by him is a additional one, which is not totally different from one which he has earlier sought. So, now I am of the view that the amendment as sought by the plaintiff requires to be allowed. Hence, following final order is passed."

6. Mr. Chinmay Gandhi, learned advocate appearing on behalf of the original defendant – petitioner herein, has vehemently assailed the impugned order of the trial Court on the ground that : Firstly, the amendment in question changes the nature of the suit and hence, could not have been permitted; secondly, the amendment

application was moved after a period of nearly 13 years and hence, also because of delay and laches the amendment could not have been granted. Elaborating on the submission it was contended that the original suit was for a declaration and permanent injunction while the amendment prayed for partition and in the circumstances the entire nature of the suit would undergo change. It was further submitted that originally the suit was registered as Regular Civil Suit but after the amendment is granted the jurisdiction of the Court would change as the suit was renumbered as Special Civil Suit. He elaborately read from the impugned order to submit that the trial Court had committed an error in granting the application for amendment. In support of the propositions he has placed reliance on the decision of the Apex Court in the case of *Kenchegowda (since deceased) by legal representatives Vs. Siddegowda alias Motegowda*, (1994) 4 SCC 294 with special reference to the observations made in Paragraph No.16 of the said judgment to submit that a suit for declaration and injunction could not be converted into a suit for partition merely by allowing an application for amendment. In relation to the second ground the learned advocate has

placed reliance on the Apex Court decision in case of *P.A. Ahammed Ibrahim Vs. Food Corporation of India*, AIR 1999 SC 3033 with special reference to the observations made in Paragraph No.8 of the said judgment to submit that delay and laches would be a relevant factor for not granting an application for amendment.

7. It is an accepted position between the parties that the suit is for declaration and injunction qua the properties held by deceased Champaklal, the basic case of the plaintiff being that the properties in hands of deceased Champaklal were properties of deceased Ratanchand and Bai Kamla entitling the plaintiff to seek share of the branch of his father late Nainsukhlal on opening of intestate succession on the deaths of Ratanchand and Bai Kamla. That the plaintiff was a minor at the relevant time and hence, his uncle, late Champaklal, had come into possession and control of the properties. It is in context of the same properties that the plaintiff has claimed additional relief of partition. In these facts there is no error committed by the trial Court in granting the application for amendment. In case the plaintiff

succeeds in establishing his right to the title of the properties to the extent of the share falling to the branch of late Nainsukhlal as a natural corollary the plaintiff would be entitled to partition of the properties. In the event the plaintiff does not succeed in establishing the title to the properties the additional relief of partition can, in no circumstances, be granted to the plaintiff. In this factual scenario, it is apparent that not only the nature of the suit does not change but it is a step in the right direction to avoid multiplicity of litigation qua the same properties between the same parties.

8. In relation to the aforesaid two decisions cited on behalf of the petitioner, it is apparent from the facts of the case in each of the decisions that the same cannot be pressed into service on behalf of the petitioner. In the first decision the Apex Court had categorically found that the trial Court had recorded a finding that partition of the suit properties had already taken place and, therefore, the High Court was in error in permitting the amendment by holding that there was no division of the suit properties. In relation to second decision it was in

context of the provisions of Section 20 of the Arbitration Act, 1940 and the Apex Court, in the first instance, found as a matter of fact that there was no institution of the suit and before provisions of Order VI Rule 17 of the Code of Civil Procedure could be applied institution of a suit was necessary. In the circumstances, none of the authorities cited by the learned advocate on behalf of the petitioner can come the aid of the petitioner.

9. However, even if the other view canvassed on behalf of the petitioner-defendant could be a possible view in exercise of jurisdiction under Article 227 of the Constitution of India it is not open to the Court to re-appreciate the evidence and arrive at a different conclusion merely because it is so possible. In the circumstances, in absence of any jurisdictional error, and that is not even the case of the petitioner, the petition does not merit acceptance, the petition being only under Article 227 of the Constitution of India. In the result, the petition is rejected. Rule discharged. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

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Bhavesh*